

1 SEAN K. KENNEDY (No. 145632)  
Federal Public Defender  
2 (Sean\_Kennedy@fd.org)  
JOHN LITTRELL (No. 221601)  
3 Deputy Federal Public Defenders  
(John\_Littrell@fd.org)  
4 Office of the Federal Public Defender  
321 East Second Street  
5 Los Angeles, California 90012  
Telephone (213) 894-5310  
6 Facsimile (213) 894-0081

7 Attorneys for Defendant  
PAUL ANTHONY CIANCIA

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9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA  
11 WESTERN DIVISION  
12

13 **UNITED STATES OF AMERICA,**

14 **Plaintiff,**

15 **v.**

16 **PAUL ANTHONY CIANCIA,**

17 **Defendant.**  
18  
19

Case No. 13-MJ-2894

REPLY TO GOVERNMENT'S  
OPPOSITION TO EX PARTE  
APPLICATION TO  
PROVISIONALLY APPOINT  
COUNSEL

20 The Office of the Federal Public Defender hereby submits this memorandum  
21 of points and authorities in response to the government's opposition to his application  
22 for an Order appointing the Office of the Federal Public Defender to provisionally  
23 represent PAUL ANTHONY CIANCIA.

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

The government made the decision to file a formal complaint against Mr. Cincia and take him into custody, yet now it seeks to prevent appointment of counsel for him. In its opposition to the Federal Public Defender's application for provisional appointment, the United States Attorney's Office sets forth no reason grounded in fairness or public safety that Mr. Cincia should be denied access to counsel at this critical stage. It ignores this district's Criminal Justice Act ("CJA") plan's principal objective, which "is to attain equality before the law for all persons." General Order No. 13-09 (filed Sept. 17, 2013), Section II. A. 1. General Order No. 13-09 provides that eligible persons should be appointed counsel "as soon as feasible after they are taken into custody." *Id.* at Section IV.B. The government further ignores the significant constitutional questions that would be presented if Mr. Cincia were held in custody, without access to counsel, despite this request.

### **I. THE CJA PLAN REQUIRES APPOINTMENT OF COUNSEL AS SOON AS FEASIBLE FOLLOWING ARREST**

18 U.S.C. § 3006A provides that each United States District Court must place in operation a "plan for furnishing representation for any person financially unable to obtain adequate representation . . . ." 18 U.S.C. § 3006A(a). That plan must, at minimum, provide representation for any financially eligible person who is

1. charged with a felony;
2. under arrest, when such representation is required by law; and
3. entitled to appointment of counsel under the sixth amendment to the Constitution.

See 18 U.S.C. § 3006A(a)(1)(A), (D), (H). This district has implemented a plan consistent with the CJA. See General Order No. 13-09.

The government notes that the CJA requires that "[a] person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate judge . . . ." 18 U.S.C. § 3006A(b). It argues that this suggests that the "right to representation pursuant to the Act begins at

1 the initial appearance.” Gov. Opp. at 4. But General Order No. 13-09, which  
 2 represents *this district’s* implementation of the CJA, requires more. Under the  
 3 heading “Timely Appointment of Counsel” the local CJA plan provides that

4 Counsel shall be provided to eligible persons *as soon as feasible after*  
 5 *they are taken into custody*, when they appear before a district judge or  
 6 magistrate judge, when they are formally charged or notified of  
 7 charges if formal charges are sealed, or when a district judge or  
 8 magistrate judge otherwise considers appointment of counsel  
 9 appropriate under the CJA, *whichever occurs earliest*.

10 General Order No. 13-09 at IV. B. (emphasis added). Further, General Order 13-06,  
 11 which addresses procedures for appointing counsel to hospitalized defendants,  
 12 provides for prompt appointment of counsel in these circumstances:

13 Upon notification, and if appropriate, a magistrate judge shall  
 14 promptly appoint the office of the Federal Public Defender to appoint  
 15 the defendant, for the purposes of ensuring compliance with Rule 5 of  
 16 the Rules of Criminal Procedure and this Order.

17 . . .

18 The exigent circumstances and the medical condition of the defendant  
 19 may not permit a full inquiry into the financial eligibility of the  
 20 defendant for the appointment of a CJA panel attorney at the time of  
 21 appointment.

22 General Order No. 13-06 (August 1, 2013).

23 The government notes that a number of judges in the Southern District of New  
 24 York (SDNY) have denied requests for appointment of counsel for defendants who  
 25 had not yet made their initial appearance. See Gov. Opp. at 5. But those cases are  
 26 distinguishable. First, each of the defendants at issue in those cases were not in  
 27 custody in the district or even the country at the time the request was made. Second,  
 28 the orders do not reflect that those courts considered the “as soon as feasible after a  
 person is taken into custody” clause of the district’s CJA plan. Third, SDNY’s plan  
 differs from the plan in this district. SDNY’s plan simply cites to 18 U.S.C. § 3006A

1 and incorporates by reference the guidelines promulgated by the Administrative  
 2 Office of the Courts. See SDNY CJA Plan.<sup>1</sup> While General Order No. 13-09 also  
 3 tracks the language of § 3006A, unlike the SDNY plan, it provides a catchall  
 4 provision that representation must be provided when “otherwise provided by law.”  
 5 See General Order No. 13-09 at IV. A. 1. k.

6 Mr. Ciancia has clearly been taken into custody in this case. A complaint has  
 7 been filed and accepted by the magistrate judge which provisionally authorized that  
 8 arrest. Under our CJA plan, he is entitled to appointment of counsel upon being  
 9 charged with a felony. General Order No. 13-09 at Section IV. A. 1. a. Black’s Law  
 10 Dictionary (9th ed.) defines a complaint as “a formal charge accusing a person of an  
 11 offense.” Black’s Law Dictionary (9th ed. 2009). See also Fed. R. Crim. P. 3 (“the  
 12 complaint is a written statement of the essential facts constituting the *offense*  
 13 *charged*”) (emphasis added).<sup>2</sup>

14 Mr. Ciancia has a number of rights that attach merely by virtue of his being  
 15 under arrest and in custody on suspicion of having committed a federal crime:

16 1. The right to be taken “without unnecessary delay before a magistrate  
 17 judge . . . .” Fed. R. Crim. P. R. 5(a)(1), and the corresponding doctrine that the  
 18 government should not use delays in presenting the defendant before the magistrate in  
 19 order to question the defendant. See Corley v. United States, 556 U.S. 303 (2009).

20 2. The due process right not to be questioned during a time when he is too  
 21 ill or injured to consent to such questioning. See Reck v. Pate, 367 U.S. 433 (1961)

22 3. The right, under Miranda v. Arizona, to be advised of the right to consult  
 23 with counsel prior to any questioning, and the right to have counsel present during any  
 24 questioning, see Miranda v. Arizona, 384 U.S. 436 (1966), and the corresponding

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25 <sup>1</sup> <http://www.nysd.uscourts.gov/file/forms/current-criminal-justice-act-plan>.

26 <sup>2</sup> In this district, courts routinely appoint counsel to individual at the complaint  
 27 stage of their cases in addition to subjects and targets of investigations. See also  
 28 Kirby v. Illinois, 406 U.S. 682, 689 (1972) (identifying “formal charge” as a point at  
 which adversarial proceedings begin as distinct from indictment, information, or  
 arraignment).

1 requirement that any waiver of that right be knowing and voluntary.

2       Once he becomes conscious (if he is not already), Mr. Ciania will be required  
3 to make vital decisions as to whether or not to waive his right to remain silent, to have  
4 an attorney appointed prior to being questioned, and to have an attorney present  
5 during any questioning. It seems beyond dispute that he will be in a better position to  
6 make informed decisions if he has the advice of counsel. For these reasons, Mr.  
7 Ciania qualifies for immediate appointment of counsel under the CJA and General  
8 Order No. 13-09. He is “under arrest” and “such representation is required by law.”  
9 “The right to counsel during preindictment custodial interrogation is settled law. This  
10 right includes appointed counsel if the suspect is indigent.” Jett v. Castaneda, 578  
11 F.2d 842, 844 (9th Cir. 1978) (internal citations omitted)(holding that appointment of  
12 counsel prior to initial appearance was proper and consistent with the Criminal Justice  
13 Act). At a minimum, it is feasible to appoint counsel for Mr. Ciania now, and the  
14 local CJA plan requires it.

15       The government’s opposition makes clear that giving Mr. Ciania advice  
16 about his rights is precisely the result it wishes to prevent. The government argues  
17 that appointing counsel would “prevent the government from questioning Ciania, as  
18 he would then be a represented party.” Gov. Opp. at 6. “Significantly,” the  
19 government argues, “this would also preclude the government from questioning  
20 Ciania, pursuant to the recognized public-safety [sic] exception to the Miranda rule,  
21 on the possible existence of co-conspirators, organizational support for his actions,  
22 and other violent plots about which Ciania could have knowledge.” This is simply  
23 untrue. Mr. Ciania is free to exercise his right to speak to the government, if he  
24 wishes, whether or not counsel is appointed. The only effect of appointing counsel is  
25 to allow him to make a more informed choice about whether to exercise his rights.

## 26 **II. IN THE ALTERNATIVE, THE COURT SHOULD CONDUCT A** 27 **HEARING**

28       If the Court is not inclined to grant our request for counsel based on the  
pleadings filed to date, the FPDO respectfully requests that a court hearing be set for

1 further argument regarding Mr. Ciania's current right to appointment of counsel.  
2 And in the event that such a hearing is set, the FPDO respectfully requests a Court  
3 Order precluding the government and its agents from interviewing Mr. Ciania prior  
4 to the Court's adjudication of this matter.

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6 Respectfully submitted,  
7 SEAN K. KENNEDY  
8 Federal Public Defender

9 DATED: November 4, 2013 By /s/ John Littrell  
10 JOHN LITTRELL  
11 Deputy Federal Public Defender  
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